2000

State of Utah v. Debra Larece Aranda : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	
	:	Case No. 20000720-CA
vs.	:	
DEBRA LARECE ARANDA, Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS ON ONE COUNT OF AGGRAVATED BURGLARY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-203 (1999); TWO COUNTS OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1999); AND ONE COUNT OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i) (1999); IN THE THIRD JUDICIAL COURT, SALT LAKE COUNTY, THE HONORABLE J. DENNIS FREDERICK PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions on one count of aggravated burglary, a first degree felony, in violation of UTAH CODE ANN. § 76-6-203 (1999); two counts of aggravated robbery, a first degree felony, in violation of UTAH CODE ANN. § 76-6-302 (1999), and one count of unlawful possession of a controlled substance, a third degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (1999), in the Third Judicial District Court, Salt Lake County, the Honorable J. Dennis Frederick presiding.[1]

[1]Defendant was also convicted on a misdemeanor count of unlawful possession of a controlled substance. R. 280-281. Whether intentionally or inadvertently, appellant's brief does not include an appeal of her conviction on that count. *See* Br. Aplt. at 1.

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(j) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Did the trial court abuse its discretion by excluding evidence of the violent propensities and criminal histories of two non-witness co-perpetrators where defendant presented no evidence that they compelled her to commit aggravated burglary and aggravated robbery?

Review of evidentiary rulings is usually for abuse of discretion. *See State v. Eberwein*, 2001 UT App 71, ¶¶ 9, 11, 21 P.3d 1139. Defendant, however, has the burden of presenting some evidence of an affirmative defense, in this case compulsion. *See State v. Wood*, 648 P.2d 71, 82 n.7 (Utah 1982). In other words, defendant has "the burden of producing some evidence of the defense" where "no evidence in the prosecution's case provides an evidentiary foundation for [the] claim." *State v. Knoll*, 712 P.2d 211, 215 (Utah 1985) (self-defense); *see also State v. Garcia*, 2001 UT App 19, ¶ 8, 18 P.3d 1123 (self-defense). Whether defendant has met that burden is a question of law, reviewed for correctness. *See Knoll*, 712 P.2d at 215.

2. Did the trial court abuse its discretion when it denied defendant's request for a two-hour continuance to find her witness, who had been turned away from the courthouse because he was so intoxicated that he could barely walk?

Review of a trial court's decision to grant or deny a continuance is for an abuse of discretion. *See Seel v. Van der Veur*, 971 P.2d 924, 926 (Utah 1998); *State v. Creviston*, 646 P.2d 750, 752 (Utah 1982). Error is reversible only if "sufficiently prejudicial that there is a reasonable likelihood of a more favorable result for the defendant in its absence." *Seel*, 971 P.2d at 926 (internal quotation marks and citation omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions, statutes, and rules are reproduced in Addendum A:

UTAH CODE ANN. § 76-2-302 (1999)
Utah R. Evid. 404
Utah R. Evid. 405
Utah R. Evid. 801

STATEMENT OF THE CASE

Defendant was charged by information with one count of aggravated burglary, two counts of aggravated robbery, two counts of aggravated kidnapping, and two counts of unlawful possession of a controlled substance. R. 17-21. Defendant admitted participation in the incident underlying the aggravated counts, but claimed compulsion. R. 359:49-52; 360:41-44. Following a jury trial, defendant was convicted on all but the kidnapping counts. R. 280-281, 291-297. Defendant's motion for a new trial was subsequently denied, and she timely appealed. R. 308, 325, 328.

STATEMENT OF THE FACTS

The Crime

Honorio Garcia was on his way to work on May 22, 1999. R. 359:56. His wife, Norma Rosales, and their three small children were asleep in their West Valley home. *Id.* at 101, 109. About 8:00 a.m. someone knocked on their door. Honorio opened the door and saw two strangers—defendant and a male. Speaking English, they asked for someone who did not live at the home. Honorio, whose English skills were limited, did not fully understand them. *Id.* at 56-58.

The male then indicated that he urgently needed to use the bathroom, and both visitors entered the home. *Id.* at 59-60. The male went into the bathroom. *Id.* at 60. Meanwhile, defendant pulled a baggy from her purse, indicating her belief that drugs were available at the home. *Id.* At that moment, the male exited the bathroom with a 12 to 14 inch knife, put the knive to Honorio's neck, and told him not to move. *Id.* at 60-61.

A second male then entered the home and grabbed a kitchen knife.[2] *Id.* at 61-62. The three visitors asked for money. *Id.* at 63. The males asked defendant for tape, and defendant took duct tape from her purse and gave it to them. *Id.* at 63-64, 151.

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[2]Defendant identified the two males as John Hender and Greg Myers. Myers was probably the first male and Hender the second. Inconsistencies between the two versions of the crime make it difficult to identify with certainty which male was Hender and which was Myers.

One of the males held a knife to Honorio's throat while the other began taping him. *Id.* at 65-66. Meanwhile, defendant entered the bedroom where Norma was sleeping, awakened her, and asked for money. *Id.* at 66. Norma, who spoke little English, did not understand. *Id.* at 103. Defendant made a gesture with her right hand, snapping her fingers, and repeatedly asked for "[m]oney, money." *Id.*

Norma recognized defendant. She had seen her on four or five occasions when defendant had sold used clothing at the apartment complex where Honorio and Norma lived before moving to this home. *Id.* at 109-111.

Defendant told Norma to go out into the living room where the males were binding Honorio. The males then bound Norma with tape. *Id.* at 67-68.

Meanwhile, defendant ransacked and searched the bedroom. *Id.* at 68. During the ten to twenty minute episode, defendant found and took gold jewelry valued at approximately $13,000, about $2400 in cash, and Honorio's watch, apparently putting many of the items in her purse. *Id.* at 70, 113-116. Meanwhile, the males were urging her to hurry. *Id.* at 69. One of the males also asked defendant for her phone number. *Id.* at 70. Honorio, who understood numbers in English, memorized it. *Id.*

Before leaving, the robbers cut the telephone cords. *Id.* at 71. On her way out, defendant dropped a hundred-dollar bill. *Id.* at 114. One of the males took the

keys to the victims' two vehicles. *Id.* at 113. Honorio observed defendant and the male trying to break into his truck. *Id.* at 73.

After they left, Honorio quickly extricated himself from the duct tape and called the police on his cellular phone. *Id.* at 73-74. He gave the police the telephone number he had memorized. *Id.* at 76.

The police traced the number to a Salt Lake City residence where they apprehended defendant later that day. *Id.* at 153-156. Honorio, who accompanied the police, identified her as the female robber. *Id.* at 157.

Defendant was driving a vehicle she had purchased that morning for $750.[3] When police asked where she had been that morning, she said she had not been anywhere that morning, but had left about an hour and a half before. *Id.* at 159. The police arrested her. *Id.* at 160.

In a search incident to the arrest, Officer Paula Lozano found $392 in cash and three rings in defendant's pocket. *Id.* at 160-161. Defendant stated that the rings belonged to her children but that she carried them with her, now that her children were adults. R. 360:15. Officer Lozano then asked defendant what her children's names were. Defendant said she had a child named Jacob. *Id.* When the officer noted the "H" initial on one of the rings, defendant changed her son's name to Hajacob and then Hobo. *Id.*

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[3]Defendant said she paid $750. Police found a receipt for $600 and a bill of sale for $750. R. 359:158; 360:12.

Honorio identified the rings as his. R. 359:78. The ring with an "H" belonged to one of his children also named Honorio. *Id.* Honorio also identified as his a watch and another ring found in defendant's purse. *Id.* at 171-172.

In the center compartment of defendant's purse, Officer Lozano found a baggy with a white substance that field-tested positive for cocaine and another baggy with a green leafy substance that field-tested positive for marijuana. R. 360:15-16.

At the police station, another officer observed a wad of money in defendant's pants. *Id.* at 17-18. He called Officer Lozano, who could see the money in the pocket she had already searched and emptied. *Id.* at 18. She asked defendant where the money, $620 in $20 bills, came from. *Id.* at 18-19. Defendant stated that it had been down her pants. *Id.* at 18.

Defendant was upset when Officer Lozano took the money from her. Defendant stated that it was ironic that she was being accused of robbery in an incident involving the robbery of a drug dealer. *Id.* at 18. She later repeated her remark about the irony of the situation, telling Detective Nudd, "You must not want the jewelry very bad, do you? I can take you right to it if you don't take me to jail." R. 359:165.

Defendant's Version

Defendant testified that Honorio was a dope dealer from whom she had regularly purchased drugs for about a year and a half. R. 360:38, 45. She testified to the following version of the incident. *Id.* at 38-54.

Defendant bought drugs from Honorio for resale to John Hender. Because she was planning to leave the state with her fiancé, Terry Pierce, Honorio asked her to bring Hender over. Honorio wanted to meet Hender because Hender was the one "who [she] made money off." *Id.* at 38-39. Further, "John was bugging [her]," apparently wanting to meet Honorio. *Id.* at 39.

She called Honorio early on the morning of the incident asking whether she could bring Hender over. *Id.* Honorio agreed to the meeting. *Id.* Defendant picked up Myers because she "like[d him] more" than she did Hender. *Id.* at 40.

When they got to Honorio's, defendant and Myers knocked on the door. Hender was doing "something" in the car. *Id.* at 41. Defendant and Myers entered the home. Defendant was explaining to Honorio that he could do business directly with Hender when Hender came in and asked Honorio to show him "what kind of drugs, what kind of business they would be doing." *Id.*

Honorio brought out three bags of dope. *Id.* Hender then asked for Honorio's scales to make sure the drugs "weigh[ed] out." *Id.* Honorio "hem-haw[ed] around" and said the battery in his scale was not working. *Id.* Hender became agitated, and

Honorio tried to back out of any deal, saying he would not do business with Hender. Hender then grabbed a knife from the dish drainer, seized Honorio, and said, "I think you will." *Id.* at 42.

Defendant claimed she asked Hender what he was doing. Hender turned around, went "like that" with the knife, and said, "You go find the rest of his drug money and stereos and whatever." *Id.* at 43. Honorio was scared, and defendant was scared for him. *Id.*

Defendant thought about running out the door, but she was the one that "brought these people here." *Id.* So she went down the hall into the bedroom and tried to explain to Norma, "They want money." *Id.* at 44. Norma did not understand. Defendant "didn't want John to come up empty-handed" so she found jewelry and stuffed it into her purse. *Id.* at 44.

She then left the bedroom, showed Hender and Myers the gold jewelry, and encouraged them to get going. *Id.* at 45-46. She wanted to get them out before anyone was hurt. *Id.* at 45.

After they left Honorio's home, defendant tried to walk away, but Hender told her to get in the car. *Id.* at 46. The three of them then went to a motel. Defendant "rant[ed] and rav[ed] at them," asking, "Hell, what the hell did you do that for" and "How dare you get me involved in this." *Id.* at 47. She claimed she then dumped everything out of her purse and left. *Id.*

She said she was frantic and afraid the "Mexicans were going to shoot [her]." *Id.* at 50. She had a thousand dollars "travel money" that had come from the sale of her fiancé's truck. *Id.* at 48.[4] Because she was so frantic and because her car had been impounded, she bought another car—the one she was using when apprehended. *Id.* at 50-51. Even though it cost more to buy the new car than to get her older car released from impoundment, she "didn't want to mess with getting the other one out and wait until Monday and all that. [She] wanted to get gone." *Id.* at 51.

Defendant was apprehended with three rings in her pocket. She claimed they must have fallen through to the bottom of her purse. When she was going through her purse, she found them and thought she might be able to sell them if she needed money, but she lied to the police about the rings because she felt so guilty. *Id.* at 51-53.[5]

Defendant concluded her testimony: "The way I felt about it was, here, I felt like the wetbacks—Honorio and Norma—they didn't even know how lucky they were probably that I was there . . . . And I felt like I had done good deed by getting [Hender] out of there, even though I was the one that took him there." *Id.* at 53-54.

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[4]Officer Lozano testified that defendant said the money was her "tax money," not her "truck" or "travel money." R. 359:15, 72.

[5]Defendant never asserted that the watch had also fallen through to the bottom of her purse. Instead, she stated that it belonged to her fiancé. R. 359:68-70, 171-172.

Cross Examination

On cross examination, defendant denied that she had duct tape in her purse. She said that she didn't know where the tape came from. *Id.* at 58. Later, however, she said didn't "know why [duct tape] was in [her] purse," but that she had been using it to pack. *Id.* at 64. When asked about Myers's pulling a knife, she stated that she was surprised. *Id.* at 58. "And I looked at him like, Are you in on it, too? Oh, Lord." *Id.*

Further, when asked on cross examination whether Hender was ever threatening when he was pointing his knife toward her, defendant responded, "He had Honorio by the shoulder and he had a knife. Then he said, You shut up and go find the rest of the dope and the money." *Id.* at 60. When pressed and asked specifically whether Hender had threatened her with harm if she did not go back into the bedroom to find the dope and money, defendant answered, "He pointed the knife, and I didn't want him to hurt Honorio or the kids." *Id.* Asked again whether he said anything to her when he pointed the knife, defendant said, "He didn't have to. I knew not to mess around just by instinct." *Id.* Asked whether she had heard Hender or Myers threaten Honorio and Norma with their lives if they didn't comply, defendant answered, "No, I didn't." *Id.* at 61.

Defendant further admitted that neither Hender nor Myers had any knowledge of the jewelry in the home. *Id.* at 65. When asked whether she could have taken

just the money, but not the jewelry, defendant said, "I figured that was more impressive. [Hender] wanted to get dope and money. And I seen this and that would be the ticket to get this man out of the house." *Id.*

Defendant said that she left all the jewelry with Hender and Myers. When asked about the rings (apparently those found in her pant pocket) and the watch and the other ring found in her purse, defendant said the rings were the ones that had fallen into the bottom of her purse and the watch belonged to her fiancé, Terry. *Id.* at 68-69.

Defendant testified that Hender was "boisterous and "aggressive" and that Myer was not trustworthy. R. 360:57. When asked why she would take "these scary guys with her" to arrange for their direct purchase of drugs, defendant answered, "Money is money, to them wetbacks and to me." *Id.* at 38, 57.

Evidentiary Rulings

First Memorialization for the Record

During a jury recess following the State's presentation of its case, the prosecutor asked for an opportunity to place a matter on the record. He stated his belief that defense counsel would "try to elicit through his witnesses, either the defendant or [her former boyfriend, William Eaton], the criminal histories of the two other suspects in this particular case." R. 360:26. He argued that such testimony would be inadmissible under rules 608, 609, and 404, Utah Rules of

Evidence. *Id.* Defense counsel responded that he would not be relying on rules 608, 609, and 404, but on rule 405(b). *Id.* at 28. The trial judge made no ruling, stating that he would have to hear the matter in context. *Id.* at 29.

Cross Examination of Detective Kevin Nudd

Defendant attempted to introduce evidence concerning the criminal history and character of her two co-perpetrators, John Hender and Greg Alan Myers. During cross-examination of Detective Kevin Nudd, defense counsel asked whether Hender and Myers "ha[d] numerous robberies." R. 359:169. The prosecutor then asked for a side-bar conference and objected. *See id.*; R. 360:78. The trial judge sustained his objection. *See* R. 360:78.

Direct Examination of William Jay Eaton

Defendant called her former boyfriend, William Jay Eaton, as a witness. R. 360:30. Eaton testified that he was acquainted with Hender and Myers and introduced them to defendant. R. 360:31-32. Defense counsel then asked Eaton what he knew about them at that time and what he had told defendant about them. R. 360:32. The State objected, and the court sustained the State's objections, ruling that the testimony would be irrelevant and hearsay. *Id.* at 32-33. Defense counsel protested that the testimony would go "directly to [his] defense." *Id.* at 32.

Defense counsel then asked Eaton whether defendant had given him "any indication of what she thought of, whether she was afraid of John." *Id.* at 33. The

witness stated that defendant did not like either Hender or Myers, but the witness was cut short by a hearsay objection to testimony "as far as what was told to this defendant or told to this witness by defendant." *Id.* Defense counsel protested, arguing, "It's my client's statement." *Id.* The court sustained the prosecutor's objection, ruling that the testimony would be hearsay. *Id.* at 33-34.

Second Memorialization for the Record

During a jury recess following the presentation of defendant's case, the trial court permitted defense counsel to make a record of the proceedings relevant to the excluded testimony. Defense counsel stated that his questions to Detective Nudd were intended to elicit testimony that Hender had been imprisoned in two different states and that Myers had been imprisoned in three different states for numerous burglaries and robberies. R. 360:77.

The trial court responded that testimony regarding the prior bad acts of non-witnesses would have tended to confuse the jury and would be "in large part irrelevant." *Id.* at 78. "[F]or the reasons voiced by the State in our previous recess incident to this matter, [the court] sustained the objections." *Id.*

Defense counsel again reiterated that he had relied on rule 405 because he believed that Hender's and Myers's convictions were important to the defense. *Id.*

Request for Continuance and Motion for New Trial

Defendant planned to call her fiancé, Terry Pierce, as one of her witnesses. Pierce arrived at the courthouse on the day he was scheduled to testify, but security staff stopped him at the entrance because he was obviously intoxicated. *Id.* at 37; R. 325-326. He smelled of alcohol and was barely able to walk. *Id.* He was told to leave the courthouse or he would be ticketed. *Id.* Court bailiffs then notified the parties. *Id.*

The trial judge allowed defense counsel some time to go downstairs and attempt to locate the witness. R. 326. Pierce was no longer in the area of the courthouse. *Id.* Defense counsel then moved for a two hour continuance to attempt to locate defendant. *Id.* The judge denied that request, and trial resumed. *Id.*

Defense counsel later placed on the record matters relevant to his continuance request. R. 360:75. Defense counsel stated that Pierce would have testified that he had purchased drugs from the victims in this case, that he knew how defendant acted around Hender and Myers, that he knew something about their plans, and that defendant had not helped plan the robbery. *Id.* at 76.

After the verdict, defense counsel moved for a new trial arguing that the trial court's refusal to permit a continuance denied defendant his right to counsel and a fair trial. R. 308. The judge denied the motion, stating that Pierce's condition would have necessitated "more than a brief interruption of trial." R. 363:11. He

further observed that, given Mr. Pierce's propensities, "one could not assume that he would show up on any subsequent occasion in any condition to testify any more so than he was the first time around." *Id.*

SUMMARY OF ARGUMENT

Defendant admitted participating in the burglary and robbery, but alleged that her participation was compelled. Defendant did not meet her burden to present an evidentiary foundation for her claim and was therefore not entitled to a compulsion defense.

Because she was not entitled to the defense, excluded testimony about her co-perpetrators' violent characters and histories was irrelevant. Even with the excluded testimony, defendant would not have carried her burden to produce some evidence that she was compelled to participate by a specific threat. Further, viewing the facts in a light most favorable to defendant, she was not entitled to the defense because (a) she placed herself in a position where coercion was probable and (b) she departed from the coercion, i.e., on her own initiative, she committed additional criminal acts that were not coerced. The excluded testimony went, at most, to the reasonableness of her failure to resist. Because she did not and could not establish other essential elements of compulsion, the testimony was irrelevant.

The excluded testimony was also properly excluded as hearsay. The trial judge properly ruled that the testimony was not admissible under Rule 405, Utah

Rules of Evidence. While defendant argues other grounds for admission on appeal, she did not argue them below and, in fact, affirmatively waived at least one of them. Further, she does not argue "plain error" or any other exception to the preservation rule, and these claims are not properly before this Court.

Even assuming that error occurred, it was harmless. Defendant was not entitled to a compulsion defense. Further, the substance of the excluded testimony was presented to the jury through other evidence adduced at trial. Finally, the State's case against defendant was overwhelming while defendant's story was riddled with inconsistencies. In the context of the case in its entirety, no reasonable likelihood exists that absent the claimed errors the result would have been different.

Defendant's claim that the trial court improperly denied her request for a two-hour continuance to locate her fiancé-witness also fails. Defendant's witness had arrived at the courthouse obviously intoxicated, and court security personnel had turned him away. Defendant has not demonstrated that she could have found and produced her witness in a condition to testify during the continuance requested or, for that matter, during any reasonable time.

Further, defendant has not demonstrated that she was prejudiced by the denial of her continuance request. Even with the witness's testimony, defendant would not have been entitled to a compulsion defense. Further, the testimony the witness might have presented was generally irrelevant and inadmissible. In any event, had a

continuance been granted, had defendant produced her witness, had he been in a condition to testify, and had he testified as proffered, no reasonable likelihood exists of a different outcome. No prejudice ensued, and any error was harmless.

ARGUMENT

I.

DEFENDANT DID NOT PRESENT A REASONABLE BASIS TO SUPPORT HER COMPULSION DEFENSE, AND THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY OF HER CO-PERPETRATORS' VIOLENT PROPENSITIES

Defendant in this case admitted participating in the underlying criminal activity, but alleged as an affirmative defense that her participation was compelled. Br. Aplt. at 6-7. Defendant did not meet her burden to provide an evidentiary foundation for her defense. *See Knoll*, 712 P.2d at 215. Therefore, as a matter of law, she was not entitled to a compulsion defense.

Defendant claims that the trial court improperly excluded evidence of her co-perpetrators' violent propensities and criminal histories. Br. Aplt. at 14. Specifically, she claims that the trial court abused its discretion by excluding as irrelevant and hearsay responses at the following junctures:

- Detective Nudd was asked whether Hender and Myers "ha[d] numerous robberies." R. 359:169.
- William Eaton was asked what he knew about Hender at the time of the incident. R. 360:32.

- Eaton was asked what he had told defendant about Hender and Myers. *Id.*
- Eaton was asked whether defendant had given him any indication that she was afraid of Hender. *Id.* at 33.

The trial court did not abuse its discretion. The trial court excluded the testimony on two primary grounds: (a) relevance and (b) hearsay. The testimony was irrelevant because defendant had presented no evidence of compulsion. At most, the testimony she sought to adduce would have been relevant to the reasonableness of her failure to resist coercion. Further, defendant demonstrated no applicable exception to the hearsay rule.

A. Because defendant presented no evidence on requisite elements of her compulsion defense, the excluded evidence—pertinent only to the reasonableness of her resistance—was irrelevant.

1. Defendant did not establish a "specific threat."

Utah's compulsion defense statute, UTAH CODE ANN. § 76-2-302 (1999) states:

> (1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.
>
> (2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

To avail herself of a compulsion defense under the statute, a defendant must present evidence that she was compelled to commit the offense by a threat of violence that she could not reasonably have resisted. Case law interpreting this statute makes clear that the threat cannot be "indefinite." *State v. Harding*, 635 P.2d 33, 35 (Utah 1981). Rather, testimony must establish the "specific detail of [any] alleged threats" and "it must have been communicated to the defendant that [s]he would be subjected to physical force presently." *Id.* Fear of danger, albeit reasonable, is insufficient. *See id.* at 34-35 (no imminent threat of violence to inmate, who had been involved in prison stabbing incident, and was afraid that something might "happen"); *see also State v. Ott*, 763 P.2d 810, 812 (Utah App. 1988) (in theft context, "defendant must be faced with a specific, imminent threat of death or serious bodily injury"); *State v. Tuttle*, 730 P.2d 630, 634 (Utah 1986) (in escape context, threat must be specific and "must be at least that which would cause substantial bodily injury").

In the instant case, defendant argues that her co-perpetrator(s) threatened the immediate use of unlawful physical force against her and against the victims and that she participated in the incident only because of that threat. The only evidence defendant presented or attempted to present regarding this threat was her personal testimony.[6]

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[6]Neither the exclusion of evidence nor the denial of a continuance, the errors claimed on appeal, affected the establishment of a threat. Rather, any testimony that

Defendant testified that she was surprised when Hender grabbed a knife from the dish drainer and held it to Honorio. When she asked Hender what he was doing, he went "like that" with the knife, and said, "You go find the rest of his drug money and stereos and whatever." R. 360:43. On cross examination, she said that he told her to "shut up and go find the rest of the dope and the money." *Id.* at 60. She testified that she was surprised to find that Myers too was involved, but did not testify that he ordered her to do anything, let alone threatened her. *Id.* at 58.[7]

During cross examination about the incident, defendant was asked whether Hender had threatened her with harm if she didn't go back to the bedroom to find drugs and money. She said, "He didn't have to. I knew not to mess around just by instinct." *Id.* at 60. When asked whether she had heard Hender or Myers threaten Honorio and Norma with their lives if they didn't comply, defendant answered, "No, I didn't." *Id.* at 61.

Defendant did not testify of any threat to her or to the victims that coerced her participation. She did testify to a possibly menacing knife gesture and to Hender's

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might have been adduced had the evidence been admitted and had the continuance been granted, would—at most—have supported defendant's claims that she did not plan to participate and that her failure to resist was reasonable.

[7]Defendant did not address the apparent inconsistency arising from her testimony that she, not Hender, invited Myers to accompany her to Honorio's home. R. 360:39. She stated, "I took Greg with me basically because I don't—I like Greg more than I did John." *Id.* She did not explain the fortuity of her invitation to the very person with whom Hender had planned the crime.

ordering her to find drugs, money, and stereos in the bedroom. She did testify to her fear of Hender and Myers. But she did not testify to any threat that unlawful physical force would be immediately used against her or against Honorio or Norma if she did not comply. No other evidence or testimony at trial established or even hinted at such a threat.

Having failed to establish the "specific detail of [an] alleged threat[]" communicated to her, defendant's compulsion defense fails as a matter of law. *Harding*, 635 P.2d at 35.

2. Defendant cannot claim compulsion because she intentionally placed herself in a situation where it was probable that she would be subjected to duress.

Further, defendant is not entitled to a compulsion defense because she "place[d] [herself] in a situation in which it is probable that [she would] be subjected to duress." UTAH CODE ANN. § 76-2-302(2). Defendant testified that the coercion occurred while she was facilitating drug sales, a criminal activity. *See* UTAH CODE ANN. § 58-37-8 (1999) (prohibiting "arrange[ment] to distribute a controlled or counterfeit substance").

Defendant also testified to Hender's volatileness and to her awareness of that trait. Defendant testified that Hender was a regular drug user. R. 360:38, 56. She said that he would "boss [her] around." *Id.* at 40. When asked to leave her home, Hender would refuse and say, "What are you going to do about it?" *Id.* She

described him as "overbearing," "boisterous," and "aggressive." *Id.* at 57. She stated that the three elderly gentlemen with whom she lived were afraid of him and that one of them wanted to testify that "[Hender] was going to shoot at him once." *Id.* at 39-40.

Drug trading activities are fraught with the potential for violence and irrational behavior, including betrayal and compulsion of one-time cohorts. By her own admission, defendant was sufficiently acquainted with Hender to know his tendencies to aggression and violence and intimidation. Assuming defendant and Hender went to Honorio's home to establish a drug conduit, as defendant alleges, defendant thereby placed herself in a situation where it was probable that she would be subjected to duress. She is therefore not entitled to a compulsion defense.

3. Even had defendant been coerced into taking money, taking the gold jewelry was an independent, uncoerced criminal act, precluding establishment of a compulsion defense.

Under Utah law, a compulsion defense is not available where a defendant is coerced to commit one criminal activity, but "depart[s] from the coercion" and commits a different criminal activity "of her own choosing." *Farrell v. Turner*, 482 P.2d 117, 120 (Utah 1971) (compulsion defense unavailable where inmate told defendant "to break into jail, get the keys, and unlock the door," but defendant instead gave the inmate hacksaw blades so that he could break out).

Here, defendant testified that Hender "wanted to get dope and money." R. 360:65. She admitted that neither Hender nor Myers knew of the valuable jewelry in Norma's room. *Id.* When asked why she took the jewelry in addition to the money, defendant said, "I figured that was more impressive. . . . And I seen this and that would be the ticket to get this man out of the house." *Id.*

Defendant thus "departed from the coercion" and engaged in an independent uncoerced act. Under the facts that she presented—the only facts that might have demonstrated compulsion—defendant cannot establish her defense.

4. Because defendant has not presented a reasonable basis to support her compulsion claim, her claims of error are necessarily harmless.

Viewing all the evidence presented or that might have been presented in a light most favorable to defendant, defendant cannot, as a matter of law, establish legal compulsion. Defendant's claimed errors are therefore harmless. Had defendant been allowed to elicit excluded testimony, the additional testimony would not have established a legal basis for a compulsion defense.

B. Defendant has waived any claims that evidence was improperly excluded as hearsay and has not demonstrated an exception to the hearsay rules.

Defendant claims that the excluded evidence should have been admitted because it fell outside the rule 801(c) hearsay definition. Br. Aplt. at 17-22. She argues that the testimony would not have been hearsay because it was

- not offered for the truth of the matter asserted and

- offered by the declarant.

Id. at 22. Defendant did not object on these grounds to the evidentiary rulings below and does not argue plain error or exceptional circumstances. She has therefore waived any claim on these grounds.

Defendant argued below that the testimony was admissible under rule 405, Utah Rules of Evidence. The trial court properly ruled that it was not.

In any event, exclusion of the evidence was harmless. Other testimony adduced sufficiently informed the jury that Hender and Myers were dangerous and that defendant had reason to fear them.

1. Defendant has not preserved her claim.

Defendant argues that the trial court erroneously excluded evidence of Hender's and Myer's violent characters and criminal histories, evidence she sought to admit to establish her compulsion defense. Br. Aplt. at 14. Defendant argues that the testimony was admissible pursuant to rule 405(b), Utah Rules of Evidence, cited as authority below. *Id.*; R. 360:28. She cites no authority for the application of rule 405(b) in this context, but does cite authority relying on rules 404(b) and 801(c). Defendant affirmatively waived reliance on rule 404 below. R. 360:28. Further, defendant did not argue the application of rule 801 below. "'Trial counsel must state clearly and specifically all grounds for objection.'" *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (quoting *State v. Larsen*, 865 P.2d 1355, 1363

n.12 (Utah 1993)). Indeed, "[t]he objection must "'be specific enough to give the trial court notice of the very error' of which counsel complains.'" *Bryant*, 965 P.2d at 546 (quoting *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 460 (Utah App. 1996) (citation omitted)). Finally, because defendant has argued no exception to the preservation rule, her claim that the testimony was admissible under rules 404 and 801 is waived. *See State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995); *State v. Pena*, 869 P.2d 932, 941 nn.8-9 (Utah 1994); *State v. Johnson*, 774 P.2d 1141, 1144-1145 (Utah 1989).

2. The trial court did not err when it excluded character and bad acts testimony proffered as admissible under rule 405.

Defendant argues that the trial court improperly excluded testimony of Hender's and Myers's criminal history that should have been admitted under rule 405, Utah Rules of Evidence. The trial court did not err.

Rule 405 provides:

> (a) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to the reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) In cases in which character or a trait of character of a person is [an] essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 405 does not "deal with the admissibility of character evidence, which is covered in Rule 404"; it "deals only with allowable methods of proving character."

Advisory Committee Notes, Fed. R. Evid. 405. In other words, rule 405 does not provide grounds for the admission of evidence otherwise excludable, e.g., under hearsay or relevance grounds. *See* Utah R. Evid. 801, 402.

Further, even if Rule 405(b) were read as a rule governing admissibility where the character of a person is an essential element of the crime, defendant could not prevail. Defendant apparently argues that Hender's and Myers's violent characters constitute an essential element of her compulsion defense. They do not. The compulsion defense requires a showing of coercion based on use or threatened imminent use of unlawful physical force. The character of the persons making the threat, violent or peaceable, is not an element of the defense. *See United States v. Swanson*, 9 F.3d 1354, 1359 (1993) (no authority "requires that a defendant who claims coercion as a defense prove that the person who conducted the coercion had a violent character").

Defendant argues specifically that the trial court erred when it excluded Eaton's answer to the question, "Was there anything about John or Greg that you told [defendant] about?" Br. Aplt. at 22; R. 360:32-33. Defendant argues that the response should have been admitted because it fell outside the definition of hearsay found in rule 801(c): "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Defendant argues that the testimony was offered, not

for proof that Hender and Myers actually committed the acts to which Eaton might have testified, but to show that defendant had reason to fear them. Br. Aplt. at 22.

As explained above, defendant did not make this argument below. She did not assert below that the testimony was being offered for this purpose. The judge therefore properly viewed the testimony as hearsay and excluded it.

Defendant also raises for the first time on appeal her claim that Eaton's response would not be hearsay by definition because Eaton was the declarant. Br. Aplt. at 22. Defendant cites Utah R. Evid. 801(c), emphasizing a portion of the rule: "'Hearsay' is a statement, other than one *made by the declarant* while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Br. Aplt. at 22. Defendant fails to observe that Eaton did not make the excluded statement "while testifying at trial or hearing," as required by the rule.

In sum, the trial court did not abuse its discretion when it excluded testimony about Hender's and Myers's criminal histories and characters. The evidence defendant sought to admit was not an essential element of her defense. In any case, the trial court ruled that it was not, as required, otherwise admissible, because it was hearsay. Defendant did not assert below that the testimony was outside the definition of hearsay and cannot now claim error on that ground.

C. Error, if any, was harmless.

If error occurred, it was harmless. In light of the overwhelming evidence against defendant, a result more favorable to defendant, absent the error, is not reasonably likely. "An erroneous decision to admit or exclude evidence . . . cannot result in reversible error unless the error is harmful." *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). An error is harmful only where, "absent the error there is a reasonable likelihood of an outcome more favorable to the defendant." *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993). In evaluating whether an error is harmful, the reviewing court must consider the importance of the challenged testimony in light of the overall strength of the State's case. *See id.*

First, defendant was not, as a matter of law, entitled to a compulsion defense. Testimony regarding her co-perpetrators' dangerous characters would not have changed that.

Second, the jury was sufficiently informed of the dangerousness of defendant's co-perpetrators by testimony that was admitted. Defendant testified that Hender was a regular drug user. R. 360:38, 56. She said that he would "boss [her] around" and that when she would ask him to leave her home he would refuse and say, "What are you going to do about it?" *Id.* at 39. She described him as "overbearing," "boisterous," and "aggressive." *Id.* at 57. She stated that the three elderly gentlemen with whom she lived were afraid of him and that one of them

wanted to testify that "[Hender] was going to shoot at him once." *Id.* at 39-40. She maintained throughout her testimony that fear of Hender compelled her criminal activity.

William Jay Eaton, defendant's former boyfriend, also testified that defendant was intimidated by Hender. R. 360:35. In addition, defense counsel elicited testimony from Detective Nudd that Hender, who at the time of trial was under investigation for participation in this offense, was already incarcerated at the Utah State Prison. *Id.* at 174-175.

The testimony presented was sufficient to inform the jury that Hender was dangerous. Further evidence of his or Myer's violent character or criminal history would have been merely cumulative.

Third, the State's case was overwhelming. Defendant was found in possession of a large amount of cash—some in her pocket and some stuffed down her pants, a new car purchased that day, and stolen jewelry taken from the victims. R. 358:158, 160-161; 360:17-19. When asked about the jewelry, she lied to police, saying the rings belonged to her children. R. 360:15. She said her son's name was Jacob, but changed the name to Hajacob and then Hobo when she learned that one of the rings had an "H" on it. *Id.* She lied about the watch, saying it belonged to her fiancé. R. 360:68-69. She told one of the police officers that the money she had was her "tax money," but testified later that it was "truck money" or "travel

money." R. 360:15, 48, 72. She said nothing of coercion to the investigating officers. Further, by her own admission, defendant alone knew the victims. R. 360:38-40. By her own admission, she came to the crime scene prepared—with duct tape in her purse. R. 360:64.

Defendant's version of the crime, by contrast, was filled with inconsistencies and wholly incredible. For example, defendant testified that

- Hender and Myers had planned the burglary/robbery without her knowledge (but she stated that she, not Hender, invited Myers to come along on the visit to Honorio's home),
- she completely emptied her purse in the motel room (but she acknowledged that she possessed various stolen rings, a man's watch, a new car, and $1000 cash when arrested later in the day),
- she had no duct tape in her purse at the time of the robbery (but she later testified that the tape may have been in her purse because she had been packing),
- she knew nothing about the planned crime (but her duct tape testimony demonstrated that she was prepared).

R. 360:39, 40, 47, 58, 64, 68, 69. No reasonable likelihood exists that the result in this case would have been different absent the alleged errors. The challenged

testimony was of minimal importance in light of the State's overwhelming case. Exclusion of the evidence was harmless.

II.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A CONTINUANCE

Defendant argues that the trial court abused its discretion when it denied her motion for a continuance to locate her witness, Terry Pierce, who had been barred from entering the courthouse. Br. Aplt. at 25-26. Pierce allegedly would have testified that

- Honorio and Norma were drug dealers,
- he and defendant had purchased drugs from them for about a year,
- he and defendant were planning to leave town,
- he and defendant had sold his truck for about a thousand dollars and got together some other cash,
- he and defendant were going to introduce Hender and Myers to Honorio so that Hender and Myers could purchase drugs directly,
- he and defendant had purchased drugs from Honorio the evening before the robbery,
- he was arrested later that evening and so was not involved in the robbery incident the following morning,
- he knew of no plan to rob Honorio and Norma,

- he had a conversation with Hender where Hender bragged about how defendant had not known about the "situation," had been stupid, and had been the one arrested,
- Hender was an imposing individual and defendant was intimidated by him.

R. 363:5-6.

The trial court did not abuse its discretion. Defendant has not demonstrated that Pierce could actually have been produced within the continuance requested.

Further, under the facts of this case, any error was non-prejudicial. Pierce would not have testified to an imminent threat. Further, his testimony would have had no favorable bearing on whether defendant placed herself in a situation where duress was probable or whether she departed from the compulsion. Even if the excluded testimony may have supported the reasonableness of defendant's failure to resist any alleged coercion, it would not, as a matter of law, have entitled defendant to a compulsion defense. Error in excluding the evidence, if any, was necessarily harmless.

A. Defendant has not shown that her witness could actually have been produced within the continuance requested or that he could have been produced within a reasonable time.

A defendant moving for a continuance to procure the testimony of an absent witness "must show that the testimony sought is material and admissible, that the witness could actually be produced, that the witness could be produced within a

reasonable time, and that due diligence has been exercised before the request for a continuance." *State v. Creviston*, 646 P.2d 750, 752 (Utah 1982). Further, on appeal she must show that she was "materially prejudiced by the court's denial of the continuance or that the trial result would have been different had the continuance been granted." *State v. Oliver*, 820 P.2d 474, 476 (Utah App. 1991).

Here, defendant request a two-hour recess to find Pierce who had appeared at the courthouse so intoxicated that he could barely walk. R. 325-326. Court security officer Cisneros informed the court that Pierce could not even get through the magnetometer. R. 363:9.

Defendant has not shown that Pierce could actually have been produced within the time requested. Had defendant successfully located him, it is unlikely, given his inebriation, that defendant would have called him or that he could have meaningfully and appropriately responded to questioning. Further, as the trial judge concluded, given "Mr. Pierce's propensities, one could not assume that he would show up on any subsequent occasion in any condition to testify any more so than he was the first time around." R. 363:11.

B. Defendant has not shown prejudice.

Defendant has not shown that she was prejudiced by the denial of the continuance. First, defendant would probably not have called Pierce in his obvious

state of intoxication. Second, no reasonable likelihood exists that Pierce's testimony would have changed the result.

Most of the matters to which Pierce allegedly would have testified would have been irrelevant and/or inadmissible. Whether the victims were drugs dealers is irrelevant. Whether Pierce knew of a plan to rob the victims is also irrelevant (and would likely be offered only to invite speculation that if Pierce did not know, then defendant would not have known).

Further, the trial judge would probably have excluded Pierce's testimony that defendant was intimidated by Hender. The trial judge excluded similar testimony by other witnesses.

Of the matters to which Pierce may have testified, those most central to defendant's defense would have been (1) an alleged conversation where Hender had bragged about how defendant had not known about the "situation," been stupid, and got herself arrested, and (2) the alleged sale of his truck for $1000. *See* R. 363:5-6.

Defendant does not explain how Hender's statement against interest would have been admissible under rule 804(3), Utah Rules of Evidence, which makes inadmissible "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused . . . unless corroborating circumstances clearly indicate the trustworthiness of the statement." Further, she does not acknowledge that Pierce's testimony that he sold his truck for $1000 and got together some

additional sum would inadequately explain her possession of $1612 to $1762 cash on the day of the crime---$392 (found in the search incident to her arrest), $620 (found later at the jail), and $600 to $750 paid out for the vehicle she purchased on the day of the crime prior to her arrest. *See* R. 359:158, 160-161; R. 360:12, 17-19.

In any event, case law requires review of the denial of a continuance in context of the case in its entirety. Here, Pierce's testimony would not have established compulsion. Further, no reasonable likelihood exists that his testimony would have changed the result. Defendant's story was inherently incredible and the evidence presented against her was overwhelming. Nothing suggests that the jury would have believed Pierce, any more than it believed defendant. *See Seel v. Van der Veur*, 971 P.2d 924, 927 (Utah 1998) (no indication, in context of incredible case, that jury would have found alibi witness more believable than defendant). Assuming the court erred in denying the continuance, error was harmless. *See id.* (when reviewing denial of continuance, court must take into account "the overwhelming weight of the evidence against [a defendant] and the general incredibility of [her] story").

Defendant has demonstrated neither an abuse or discretion nor prejudice based on the trial court's denial of her motion for a continuance.

CONCLUSION

Defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of September. 2001.

MARK L. SHURTLEFF
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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were either mailed, postage prepaid, or hand-delivered to D. Bruce Oliver, counsel for defendant/appellant, 180 South 300 West, Suite 210, Salt Lake City, UT 84101-1490, this 5th day of September, 2001.

Addendum A

(2) The conduct constituting the offense is authorized, solicited, requested, commanded, or undertaken, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation or association 1973

76-2-205. Criminal responsibility of person for conduct in name of corporation or association.

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf 1973

PART 3

DEFENSES TO CRIMINAL RESPONSIBILITY

76-2-301. Person under fourteen years old not criminally responsible.

A person is not criminally responsible for conduct performed before he reaches the age of fourteen years This section shall in no way limit the jurisdiction of or proceedings before the juvenile courts of this state. 1973

76-2-302. Compulsion.

(1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.

(2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

(3) A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion or to any defense of compulsion except as in Subsection (1) provided. 1973

76-2-303. Entrapment.

(1) It is a defense that the actor was entrapped into committing the offense Entrapment occurs when a peace officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial Any order by the court dismissing a case based on entrapment shall be appealable by the state

(6) In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial 1998

76-2-304. Ignorance or mistake of fact or law.

(1) Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime

(2) Ignorance or mistake concerning the existence or meaning of a penal law is no defense to a crime unless

(a) Due to his ignorance or mistake, the actor reasonably believed his conduct did not constitute an offense and

(b) His ignorance or mistake resulted from the actor s reasonable reliance upon

(i) An official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question, or

(ii) A written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question

(3) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed 1974

76-2-304.5. Mistake as to victim's age not a defense.

(1) It is not a defense to the crime of child kidnaping, a violation of Section 76-5-301 1, rape of a child, a violation of Section 76-5-402.1, object rape of a child, a violation of Section 76-5-402.3, sodomy upon a child, a violation of Section 76-5-403 1, or sexual abuse of a child, a violation of Section 76-5-404 1, or aggravated sexual abuse of a child, a violation of Subsection 76-5-404 1(3), or an attempt to commit any of those offenses, that the actor mistakenly believed the victim to be 14 years of age or older at the time of the alleged offense or was unaware of the victim's true age.

(2) It is not a defense to the crime of unlawful sexual activity with a minor, a violation of Section 76-5-401, sexual abuse of a minor, a violation of Section 76-5-401 1, or an attempt to commit either of these offenses, that the actor mistakenly believed the victim to be 16 years of age or older at the time of the alleged offense or was unaware of the victim s true age 1999

76-2-305. Mental illness — Use as a defense — Influence of alcohol or other substance voluntarily consumed — Definition.

(1) (a) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.

(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony under Section 76-3-207 and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense under Section 76-5-205 5.

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

(Amended effective October 1, 1992; February 11, 1998.)

Advisory Committee Note. — Provisions of this rule apply to character evidence to prove conduct, as distinguished from proof of character where character is an essential element of a charge, claim or defense. As to the latter, see Rule 405(b). See also Advisory Committee Note to Rule 404, Federal Rules of Evidence. Rule 47, Utah Rules of Evidence (1971) was comparable. See also State v. Day, 572 P.2d 703 (Utah 1977) (character evidence as to the character of the victim of a homicide was admissible to rebut the defendant's contention that the deceased was the aggressor). One significant difference between this rule and Rule 47, Utah Rules of Evidence (1971) is that there is no provision for the use of character evidence in civil cases, except where character is the ultimate issue in question, whereas Rule 47 authorized the use of character evidence in civil cases not only on the ultimate issue but where otherwise substantively relevant. See Boyce, Character Evidence: The Substantive Use, 4 Utah

trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.
(Amended effective October 1, 1992.)

Advisory Committee Note. — This rule is the federal rule, verbatim, and is consistent with Rule 46, Utah Rules of Evidence (1971) and the decisions of the Utah Supreme Court. Cf. State v. Howard, 544 P.2d 466 (Utah 1975). Rule 47, Utah Rules of Evidence (1971) appears to be covered by subdivisions (a)(1) or (b) of Rule 404.

Cross-References. — Slander, truth as defense, § 76-9-508.

NOTES TO DECISIONS

Character trait in issue.
Specific instances of conduct.
Testimony as to reputation.
Victim's reputation.
Cited.

Character trait in issue.

Defendant's general reputation for honesty and veracity are not in issue on a charge of sexual abuse. State v. Sisneros, 581 P.2d 1339 (Utah 1978).

Since evidence of character is not an essential element of sexual abuse of a child, proof cannot be made under Subdivision (b); proof must be made under Subdivision (a) by testimony as to reputation or in the form of an opinion. State v. Lenaburg, 781 P.2d 432 (Utah 1989).

Specific instances of conduct.

Since a defendant's character is not an element of the crime of sexual abuse of a child, a court does not err in denying the request by a defendant charged with such crime for admission of past instances of conduct relating to his "reputation for sexual morality." State v. Miller, 709 P.2d 350 (Utah 1985).

Testimony as to reputation.

The accepted procedure in eliciting testimony of one's reputation as it pertains to his character or a trait of his character that is in issue is to first qualify the witness by determining if he is acquainted with the reputation of the person in question, and if so, then to have him relate what that reputation is. State v. Goodliffe, 578 P.2d 1288 (Utah 1978).

Witness' individual opinion is inadmissible as evidence of person's reputation. State v. Goodliffe, 578 P.2d 1288 (Utah 1978).

Victim's reputation.

In rape prosecution, where evidence shows that the association between the parties came about in a sociable and peaceable manner and transition to violence is claimed, there is genuine and critical issue as to consent so that the probative value of the victim's reputation to moral character outweighs the negative factors and justifies admission of evidence as to her reputation. State v. Howard, 544 P.2d 466 (Utah 1975).

Cited in State v. Speer, 750 P.2d 186 (Utah 1988); State v. Alonzo, 932 P.2d 606 (Utah Ct. App. 1997), aff'd, 973 P.2d 975 (Utah 1998).

COLLATERAL REFERENCES

Utah Law Review. — Rape Victim Confrontation — 1985, 1985 Utah L. Rev. 3, 687.

Note, Enhancing Penalties by Admitting "Bad Character" Evidence During the Guilt Phase of Criminal Trials — *State v. Bish*, 1989 Utah L. Rev. 1013.

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Amended effective October 1, 1992.)

Advisory Committee Note. — Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of "hearsay" in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See California v. Green, 399 U.S. 149 (1970), with respect to confrontation problems under the Sixth Amendment to the United States Constitution. Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language "or the witness denies having made the statement or has forgotten" and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence (1971). The Utah court has been liberal in its interpretation of the applicable rule in this general area. State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957).

Subdivision (d)(1)(C) comports with prior Utah case law. State v. Owens, 15 Utah 2d 123, 388 P.2d 797 (1964); State v. Vasquez, 22 Utah 2d 277, 451 P.2d 786 (1969).

The substance of subdivision (d)(2)(A) was contained in Rules 63(6) and (7), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Similar provisions to subdivisions (d)(2)(B) and (C) were contained in Rule 63(8), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Rule 63(9), Utah Rules of Evidence (1971), was of similar substance and scope to subdivision (d)(2)(D), except that Rule 63(9) required that the declarant be unavailable before such admissions are received. Adoptive and vicarious admissions have been recognized as admissible in criminal as well as civil cases. State v. Kerekes, 622 P.2d 1161 (Utah 1980).

Statements by a coconspirator of a party made during the course and in furtherance of the conspiracy, admissible as non-hearsay under subdivision (d)(2)(E), have traditionally been admitted as exceptions to the hearsay rule. State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941). Rule 63(9)(b), Utah Rules of Evidence (1971), was broader than this rule in that it provided for the admission of statements made while the party and declarant were participating in a plan to commit a crime or a civil wrong if the statement was relevant to the plan or its subject matter and made while the plan was in existence and before its complete execution or other termination.

Cross-References. — Affidavits admissible in hearing on motion, U.R.C.P. 43(b).

Affidavits, taking and certification of, § 78-26-5 et seq.

Contemporaneous entries and writings of decedent as prima facie evidence, § 78-25-8.

Depositions and discovery, U.R.C.P. 26 et seq.

Judgment, entry of, U.R.C.P. 58A.

Judgment roll in criminal case, contents and filing, U.R.Crim.P. 22.

Marriage certificate, issuance and filing, §§ 30-1-6, 30-1-12.

Official records as evidence, § 78-25-3, U.R.C.P. 44.